

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 258 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

SATRUGHNA M DIXIT

Versus

RAMANLAL K PATEL

Appearance:

MR DF AMIN for Appellant

MR MK SHELAT FOR MR SN SHELAT for Respondent No. 1, 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 03/03/2000

ORAL JUDGEMENT

1. Learned Advocate Mr. D.F. Amin on behalf of the
appellant and learned Advocate Mr. M.K. Shelat on
behalf of Mr. S.N. Shelat for the respondents were
heard.

2. The substantial question of law which arose in this Second Appeal is whether transaction between the parties is a lease or a mere licence. The question arose in the background of the following facts that the suit premises was given by the present appellant to present respondent No.1, according to the case of the appellant, on licence for mere use of the premises for sleeping at night and this premises was given to the respondent No.1 on the recommendation of respondent No.2 Dr. Laxmiben Dahyabhai Patel because respondent No.1 Ramanlal Koyabhai Patel was her Driver. The appellant's case is that the Respondent No.1 was only permitted by him to go to the said room for sleeping at night and the possession of the same was retained with the appellant and an agreement to leave and licence was executed between appellant No.1 and respondent No.1, which was signed by respondent No.2 also and is at Exh.42 of the record of the original suit and Exh.15 of the record of the First Appellate Court. As per the agreement, according to the case of the appellant, this premises was permitted to be used by him for three months only and without any consideration and since respondent No.1 continued even after permitted three months were over, a notice was served on respondents No. 1 and 2 and a Suit being Regular Civil Suit No. 274 of 1994 was filed by the present appellant in the Court of Civil Judge (JD) at Surat for the decree of vacant possession of the suit premises. After full fledged trial, suit came to be dismissed with observations of the trial court that the nature of transaction between the parties was of lease and not of a licence. The present appellant being plaintiff of the same suit filed a Regular Civil Appeal No. 173 of 1979 in the court of District Judge at Surat, wherein by consent of the parties, the present respondent No.2 as also the respondent No.2 in the above said Civil Appeal No. 173 of 1979 was allowed to file a written submission and adduced evidence. After hearing of the parties, learned Jt. District Judge, Surat, vide his decision in the above said appeal on 30.01.1982 dismissed the appeal with the observations that the document in question was a camouflaged, to thwart and to escape from the stringent provisions of the Bombay Rent Act. Being aggrieved, the original plaintiff has filed this Second Appeal. While admitting the Appeal, the following two substantial questions of law, inter alia, were framed :

- (a) Whether in the facts and circumstances of the case, the lower appellate court has substantially erred in law in permitting the defendant No.2 to sign the pleadings at the appellate stage in as much as the provisions of Order 8, Rule 5 of the

Code of Civil Procedure has been over ruled.

(b) Whether in the facts and circumstances of the case, the lower appellate court has substantially erred in law in permitting the defendant No.2 to give deposition at the appellate stage, quite contrary to the provisions of the Order 41, Rule 27 of the Code of Civil Procedure.

3. So far as the above two substantial questions of law is concerned, it now loses the importance because it is revealed from the record that the respondent No.2 was by consent of the other side i.e. the original plaintiff, allowed to file the written statement and was permitted to give evidence and in those circumstances the learned First Appellate Judge gave permission to the present Respondent No.2 to file written statement as well as allowed to adduce evidence in Appeal No. 173 of 1979 and, therefore, the above mentioned two substantial questions of law are required to be decided against the appellant.

4. Thereafter, the following remaining substantial questions of law were framed.

(c) Whether in the facts and circumstances of the case, the lower appellate court has substantially erred in law in interpreting the document Exh.5 to mean a lease deed.

(d) Whether in the facts and circumstances of the case, the lower appellate court has substantially erred in law in not considering the factor, namely :-

(x) that no consideration was required to be paid by the defendant No.1 or that the duration of licence deed was only three months or that the plaintiff had served a notice dated 1st May, 1973 i.e. on the next day of the expiry of the Licence Period calling upon the defendant No.1 to hand over possession of the suit property etc., before coming to the conclusion that Exh.15 is a lease deed and not a licence deed.

(y) Whether the courts below have substantially erred in law in dismissing the suit of the plaintiff in as much as even if it is assumed for the same of

argument that lease is created between the parties, the only proper course for the courts was to return the plaint for presentation to the proper court.

5. In sum and substance, in this Second Appeal, it is required to be decided whether both the courts below erred in law in interpreting the document - Exh.15 and coming to a conclusion that the nature of transaction was of landlord and tenant, creating tenancy in favour of respondent No.1. Learned Advocate Mr. D.F. Amin on behalf of the appellant vehemently urged that to arrive at the conclusion, it is important to ascertain the intention of the parties to the document. To ascertain whether a transaction is a lease or tenancy, according to Mr. D.F. Amin, it is not only the exclusive possession, but consideration for the use and occupation of the premises, is required to be proved, which is not proved by the defendant and, therefore, both the lower courts have erred in coming to the wrong conclusion. Learned Advocate Mr. D.F. Amin has submitted that firstly there is no evidence of consideration and further according to the agreement, the suit premise was given for the occupation only for the period of 3 months. According to Mr. Amin, the intention of the parties can be ascertained from this and the intention was to create Licence only. Further, learned Advocate Mr. Amin submits that the conduct of the plaintiff is also required to be seen that immediately after the period of 3 months was over the plaintiff served the defendant No.1 i.e. present Respondent No.1 with a notice. Mr. Amin contends that this fact also denotes the intention of the plaintiff that the premises was given for the mere user as a licensee.

6. In light of the above argument, this court is required to decide whether Exh.15 i.e. the so called leave and licence agreement is acted upon by the parties. Now in this regard, the attendant circumstances of the case is required to be seen. The glaring fact which is noticed is that the plaintiff has asked relief for the possession from the defendant No.1 while we look to the agreement, which is at Exh.15, it clearly denotes that the respondent No.1 was only permitted to use the suit premises for sleeping at night. It is categorically made clear in the agreement that the possession of the premises shall remain with the plaintiff and the plaintiff retains the control over the premises. Even then surprisingly the relief is asked for by the plaintiff is regarding obtaining the possession of the premises. Inescapable inference in the circumstances is

that the exclusive possession in contradictions to the agreement at Exh.15 was handed over to respondent No.1. The circumstance is also required to be appreciated coupled with the above facts that it is not the case of the plaintiff that the suit room was given on Licence and Respondent No.1 has encroached upon the possession of the room. Therefore, these circumstance are sufficient to establish that the parties never intended to act upon the agreement. From the record it is amply clear that exclusive possession was handed over to the respondent No.1. Mr. D.F. Amin, learned advocate for the appellant has fairly admitted that it is proved that the exclusive possession was with respondent No.1, and if that is the case, the transaction which is narrated in the agreement - Exh.15 of leave and licence would not have at all acted upon by the parties and the intention of the parties therefore must be to let the premises to the respondent No.1.

6. At this juncture, Mr.Amin argues that it is also necessary coupled with the fact of exclusive possession that it is proved that premises are exclusively enjoyed for consideration. Mr. Amin argues that not only exclusive possession but consideration for use and occupation must also be proved and the fact regarding consideration is not proved by the respondent. Mr. Amin contended that, therefore, there cannot be any inference regarding tenancy.

7. To appreciate the above contention, on verifying the record, and in the manner the learned first appellate Judge has appreciated the evidence, it appears that the consideration is also proved. While considering the deposition of respondent No.2, the learned First Appellate Judge has come to the conclusion that the rent was fixed at Rs. 50 per month for the premises. Mr. Amin has urged that learned appellate Judge has committed an error in law in coming to this conclusion. Mr.Amin has pointed out to a contradictions that the respondent No.1 has deposed that he had not given any advances towards the rent while respondent No.2 says in her deposition that the advance of three months Rs.150 was paid to the plaintiff. But, this argument cannot be upheld for the simple reason that this contradiction is not material, and that what is material is, what was the intention of the parties at the time of entering into the transaction and that is quite established from the deposition of defendants No. 1 and 2 i.e. respondents No.1 and 2 herein that rent was fixed. This deposition cannot be disputed merely on the ground that there is some contradictions between respondents No. 1 and 2

regarding the payment of advance rent. It is not material whether rent was paid or not. What is material is whether any amount for the use and occupation was fixed or not. In this case, it is established that the amount of Rs. 50/- was fixed as rent and this is clear from the deposition of respondents No. 1 and 2. Therefore, a case is established that the respondent No.1 was handed over an exclusive possession for which a rent of Rs.50/- was fixed. In these circumstances, both the courts below correctly held that the agreement executed, though labelled as leave and licence agreement was never intended to be acted upon, but it was the weapon in the hands of the appellant to be used as counter blast against protection, with which the respondent No.2 is benefitted by the provisions of the Bombay Rent Act.

8. This Court agrees with the reasons assigned by the first appellate court and the trial court generally for coming to the conclusion. Therefore, this court is not required to go in each details. In this view of the matter, this Appeal fails and the same is dismissed with no order as to costs.

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